

TO: All Personnel  
FROM: Emil E. Tahvonen

No. 6 - January 13, 1982  
Special Assessments  
Townships - Sewers and Paving

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

CONSTITUTIONAL LAW: Const 1963, art 9, §§ 6 and 31--  
approval of electors on bonds  
for payment of improvement for  
which special assessments are  
levied

TOWNSHIPS: Approval of electors for  
creation of special assessment  
district for sewer and paving  
improvements  
  
Financing of sewer and paving  
improvements by indebtedness to  
contractor

Const 1963, art 9, § 6 does not require prior approval by  
township electors of a levy of special assessments for sewer  
and paving projects made pursuant to 1954 PA 188.

Const 1963, art 9, § 6 requires prior voter approval of bonds  
issued by a township on and after December 23, 1978, to pay  
for sewer and paving improvements for which special assessments  
have been levied.

A township is without authority to finance sewer and paving  
improvements for which special assessments have been levied  
by an arrangement establishing a debt to a contractor for the  
construction of sewer and paving improvements payable from  
special assessment receipts.

Opinion No. 6018

DEC 22 1981

Honorable Thomas Guastello  
State Senator  
The Capitol  
Lansing, Michigan 48909

You have requested my opinion on several questions  
concerning the authority of townships to finance public  
improvements. Each of your questions is answered seriatim.

1. Does Const 1963, art 9, § 6, require  
prior approval by township voters of  
special assessments for sewer and paving  
projects made pursuant to 1954 PA 188, as  
amended; MCLA 41.721 et seq; MSA 5.2770(51)  
et seq?

Limitations on the taxing power of townships emanate primarily from the first paragraph of Const 1963, art 9, § 6, as last amended by the people in November, 1978, which provides:

"Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. Under procedures provided by law, which shall guarantee the right of initiative, separate tax limitations for any county and for the townships and for school districts therein, the aggregate of which shall not exceed 18 mills on each dollar of such valuation, may be adopted and thereafter altered by the vote of a majority of the qualified electors of such county voting thereon, in lieu of the limitation hereinbefore established. These limitations may be increased to an aggregate of not to exceed 50 mills on each dollar of valuation, for a period of not to exceed 20 years at any one time, if approved by a majority of the electors, qualified under Section 6 of Article II of the constitution, voting on the question."

Exceptions to the foregoing tax limitations are set forth in the second paragraph of section 6, which states in pertinent part:

"The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds approved by the electors or other evidences of indebtedness approved by the electors or for the payment of assessments or contract obligations in anticipation of which bonds are issued approved by the electors, which taxes may be imposed without limitation as to rate or amount;...."

Hence, pursuant to Const 1963, art 9, § 6, maximum ad valorem tax limitations are imposed on townships which may be exceeded only in the event that township voters approve additional tax levies for the payment of principal and interest on bonds or other evidences of indebtedness, or for the payment of contract obligations in anticipation of which bonds are issued. See OAG, 1977-1978, No 5417, p 740 (December 20, 1978).

It is important to emphasize that the above-quoted constitutional limitations apply only to ad valorem property taxes and not to special assessments. In contrast with ad valorem property taxes, special assessments represent a levy against property for the payment of a public improvement which confers a corresponding benefit upon the assessed property. Blake v Metropolitan Chain Stores, 247 Mich 73; 225 NW 587 (1929); St Joseph Township v Municipal Finance Commission, 351 Mich 524; 88 NW2d 543 (1958); Fluckey v City of Plymouth, 358 Mich 447; 100 NW2d 486 (1960), OAG, 1979-1980, No 5562, p 389 (September 17, 1979). Consequently, a special assessment is not subject to the millage limitations of Const 1963, art 9, § 6. See Graham v City of Saginaw, 317 Mich 427; 27 NW2d 42 (1947); OAG, 1979-1980, No 5706, p 770 (May 13, 1980).

Contrariwise, an assessment levied against all real property within a local unit of government which does not confer a special benefit on the property assessed is a tax, notwithstanding the fact that it is denominated by statute as a special assessment. In OAG, 1979-1980, No 5706, p 770

(May 13, 1980), it was determined that a so-called special assessment against all of the property within a municipality to finance a municipal ambulance service would be, in effect, a general tax subject to the voter approval requirements of Const 1963, art 9, §§ 6 and 31. The reason for the conclusion was that a municipal-wide levy for such a purpose is not a special assessment since it would be for the benefit of all of the residents thereof and would confer no special benefit on the property assessed.

A review of the provisions of 1954 PA 188, as amended; MCLA 41.721 et seq; MSA 5.2770(51) et seq, reveals that the financing of township improvements, as authorized therein, may involve both the levy of special assessments and general taxation. Pursuant to 1954 PA 188, supra, § 5, after a township board has resolved to make an improvement, based either on petition or upon initiative of the board, payment for that improvement is to be made by assessing the property to be benefited. This is accomplished by the establishment of special assessment districts wherein each parcel of property is assessed a proportionate share of the total cost based on the benefits resulting from the improvements. Additionally, 1954 PA 188, supra, § 15, authorizes the board to obtain initial funding to defray all or part of the costs of the improvements by borrowing money and issuing the bonds of the township in anticipation of the collection of the special assessment.

However, the authority to issue bonds which pledge the full faith and credit of the entire township and to levy taxes against all taxable township property, without limitation

as to rate or amount to meet principal and interest on outstanding bonds, is clearly not limited to assessments against the property which would benefit from the improvements. Thus, a tax, and not a special assessment, would be involved.

It is my opinion, therefore, that Const 1963, art 9, § 6, does not require prior approval of township voters for the levy of special assessments to pay the costs of sewer and paving improvements made pursuant to 1954 PA 188, supra, if the assessments are restricted to levies against properties which derive a corresponding benefit from the improvement.

2. Does Const 1963, art 9, § 6, require that township voters approve the issuance of bonds pledging the full faith and credit of the township where a special assessment district was established prior to December 23, 1978, the effective date of the Headlee Amendment, but all steps necessary to be taken in order to issue the bonds would occur subsequent to that date?

Your second question was answered in OAG, 1977-1978, No 5417, p 740 (December 20, 1978), wherein it was concluded that Const 1963, art 9, § 6, as amended by Proposal E (popularly referred to as the "Headlee Amendment" which took effect on December 23, 1978) precludes municipalities from issuing bonds and levying ad valorem taxes without limitation as to rate or amount for purposes of paying principal and interest thereon without prior approval of the electors. See also OAG, 1979-1980, No 5631, p 559 (January 23, 1980).

In light of the above, I must answer your second question in the affirmative.

3. May a township finance a special assessment district by borrowing money from the contractor who is responsible for making the improvements with a promise to repay him from the special assessment?

Township boards are authorized to make public improvements and to defray the costs of those improvements by special assessments against the property benefited pursuant to 1954 PA 188, supra, § 1,<sup>1</sup> which provides:

"The township board shall have the power to make the hereinafter named improvements, to provide for the payment thereof by the issuance of bonds as set forth in section 15 and to determine that the whole or any part of the cost of the improvements shall be defrayed by special assessments against the property especially benefited thereby. The cost of engineering services, all expenses incident to the proceedings for the making of the improvement and the financing thereof, and not to exceed 1 year's interest on any bonds to be issued hereunder, shall be deemed to be a part of the cost of the improvement." [Emphasis added.]

1954 PA 188, supra, § 15, authorizes township boards to finance public improvements by borrowing money in anticipation of special assessment receipts:

"The township board may borrow money and issue the bonds of the township therefor in anticipation of the collection of special assessments to defray all or part of the cost of any improvement made under this act after the special assessment roll therefor shall have been confirmed."

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<sup>1</sup> While a number of statutes pertain to public improvements and special assessments by townships, you have asked me to limit my answer to consideration of 1954 PA 188, as amended; MCLA 41.721 et seq; MSA 5.2770(51) et seq, which authorizes most, if not all of the improvements treated in the other acts.

Such bonds shall not exceed the amount of the special assessments in anticipation of the collection of which they are issued, and shall bear interest at a rate not exceeding the maximum rate permitted by Act No. 202 of the Public Acts of 1943, as amended, being sections 131.1 to 138.2 of the Michigan Compiled Laws. Collections on special assessments to the extent the same are pledged for the payment of bonds shall be set aside in a special fund for the payment of such bonds. Bonds may be issued in anticipation of the collection of special assessments levied in respect to 1 or more public improvements, but no special assessment district shall be compelled to pay the obligation of any other special assessment district. The township board may pledge the full faith and credit of the township for the prompt payment of the principal of and interest on the bonds authorized herein, as the same shall become due, in which event the township may levy a tax on all taxable property in the township for the payment of principal and interest on the bonds without limitation as to rate or amount and in addition to all other taxes which the township may be authorized to levy. The issuance of bonds under this section shall be subject to Act No. 202 of the Public Acts of 1943, as amended, being sections 131.1 to 138.2 of the Michigan Compiled Laws. Bonds issued hereunder shall be executed by the supervisor and township clerk and the interest coupons to be attached thereto shall be executed by the officials causing their facsimile signatures to be affixed thereto." [Emphasis added.]

As indicated in the underscored language of 1954 PA 188, supra, § 15, that act must be read together with the Municipal Finance Act, 1943, PA 202, as amended; MCLA 133.1 et seq; MSA 5.3188(6) et seq, which governs generally the borrowing of money by municipalities. 1943 PA 202, supra, § 1, states, in pertinent part:

"A municipality shall not borrow money and issue obligations payable out of taxes or special assessments except in accordance with this act...."

1943 PA 202, supra, § 2(1) and (2), provide for the manner in which the municipalities are to issue bonds payable out of special assessments:

"(1) Obligations, the issuance of which are governed by this act, shall not be payable on demand or sold at a price which would make the net interest rate on the money borrowed exceed the maximum rate set under section 1a of this chapter, or sold at a discount exceeding 10% of the principal amount of the obligations. Obligations of an authorized issue of less than \$10,000.00 may be sold at private sale. Obligations of an authorized issue of \$10,000.00 or more shall be sold, except as provided in this section, at public sale, after notice by publication at least 7 days before the sale, (a) in a publication printed in the English language and circulated in the state, which carries as a part of its regular service notices of the sale of municipal bonds and which has been approved by the commission as a publication complying with the qualifications provided in this section, and also (b) in a newspaper of general circulation in the municipality designated by the governing body of the municipality. The sale of an authorized issue of less than \$20,000.00 need be advertised in 1 publication only, which shall comply with the requirements of either (a) or (b) above, and which shall be designated by the governing body of the municipality. Approval by the commission or designation by the governing body shall be considered conclusive of the qualifications of publications for the insertion of the notices. A municipality shall not advertise its proposed obligations for sale until it has first secured the approval of the commission to the notice of the sale to be published.

"(2) If the municipality has received a bid or bids at the time fixed for public sale which is rejected by the governing body, then the obligations may be sold at private sale within 30 days thereafter at a price not less than the highest bid received at the public offering, or if the municipality has offered the obligations at 2 public offerings and has not received



at the latter any bid or a bid satisfactory to the governing body, then the obligations may be sold at a private sale within 30 days after the last public offering at a price not less than the highest bid, if any, received at the last public offering."

The above statutory subsections, when read together, indicate that the only method of financing available to townships seeking to defray the cost of public improvements out of special assessments is the issuance of bonds, presuming that the township would be unable to repay the debt incurred within the fiscal year in which the contract was entered into by the township.

Additionally, it should be noted that a township would be authorized to repay the indebtedness owed a contractor for the construction of the improvement with such funds as are available in the budget of the fiscal year in which the contract is entered into by the township. See OAG, 1955-1956, No 2542, p 260 (May 10, 1956).<sup>2</sup>

It is my opinion, therefore, that a township lacks the statutory authority to finance a special assessment district by an arrangement establishing a debt wherein it is contemplated that the contractor construct the improvements, payment for which will be from special assessment receipts.

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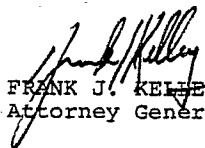
<sup>2</sup>It should be noted that the discussion in response to Question 3 recognizes the distinction between the construction contract pursuant to which the contractor constructs the desired improvements and that instrument pursuant to which the contractor as lender would loan money to the township.

Your last two questions are related and will be considered together.

4. Is the answer to Question 3 above affected by whether the township's promise to repay is backed by the full faith and credit of the township?

5. Would voter approval be required for the financing plans set forth in Questions 3 and 4 above?

In light of my answer to the third question, no answer to these questions is required.

  
FRANK J. KELLEY  
Attorney General